PUBLIC PROSECUTOR

v.

CHAN CHENG SIM

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN
HJ. ISHAK JC
[PERAK CRIMINAL REVISION
NO: 43-7-93]
18 JUNE 1993

CRIMINAL PROCEDURE CODE: Bail - Section 39A(2) Dangerous Drugs Act 1952 - Whether court has discretion to grant bail pending trial - Restriction to grant bail - Section 41B(1)(b) of the said Act - Special provision in special statute - Conflicting provision on bail in Dangerous Drugs Act 1952 and Criminal Procedure Code - Whether special provision excludes operation of general provision in general law - Definition of bail.

This was an application for revision by the Accused for an order that she be granted bail pending trial. The Accused was charged for an offence under s. 39A(2) of the Dangerous Drugs Act 1952 at the Sessions Court, Taiping. She applied for bail but the Sessions Court refused on the ground that it offended the provision under s. 41B(1)(b) of the said Act. Hence this criminal revision on the application of the Accused.

Held:

[1] The restriction on bail under s. 41B of the Dangerous Drugs Act 1952 is absolute and neither the court below nor the High Court has power to admit to bail any person charged with an offence punishable with death or more than 5 years' imprisonment or even for lesser terms when the Public Prosecutor certified in writing that it is against the public interest to allow bail.

[2] As there are no valid grounds to disturb the order of the Sessions Court Judge, the said order which refused bail to the Accused was affirmed.

[Order of Sessions Court Judge affirmed].

Cases referred to:

Aminchand v. Crown (AIR) 1950 EP 53, 51 Cr. L.J. 480 ***(refd)***
Sulaiman bin Kadir v. PP [1976] 2 MLJ 37 ***(refd)***
Re K.S. Menon [1946] MLJ 49 ***(refd)***
King Emperor v. Nga San Htwa (ILR 5 Rangoon 276) ***(refd)***
King Emperor v. Joglekar (ILR 54 Allahabad 115) ***(refd)***
Regina v. Ooi Ah Kow [1952] MLJ 95 ***(refd)***
Che Su binti Daud v. Public Prosecutor [1978] 2 MLJ 162 ***(refd)***
Loy Chin Hei v. Public Prosecutor[1982] CLJ 37 / [1982] 1 MLJ 31 ***(refd)***
Public Prosecutor v. Chew Siew Luan [1982] CLJ 354 / [1982] 2 MLJ 119 FC ***(refd)***
Leong Siew Hoong v. Public Prosecutor [1988] 1 MLJ 396 ***(refd)***
Yap Sooi Kim v. Public Prosecutor[1989] 2 CLJ 242 / [1989] 1 MLJ 44 ***(refd)***
Leong Ying Ming v. Public Prosecutor [1990] 2 MLJ 359 ***(refd)***
Leong Ying Ming v. Public Prosecutor [1993] 1 AMR 11 399 / [1993] 2 CLJ 143 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 3, 388(i), 389 & 394
Dangerous Drugs Act 1952, ss. 39A(2), 41B(a) & (1)(b)

For the Public Prosecutor - Haji Zainol Rashid bin Hussin, DPP
For the Accused - Mohd Ismail bin Mohamed; M/s. Ismail, Khoo & Associates

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak JC:

This is a revision by the Accused for an order that she be granted bail pending trial. The Accused was charged with a offence under s. 39A(2) of the Dangerous Drugs Act, 1952 ("the Act") before the Sessions Court, Taiping, Perak. Bail was applied for before the Sessions Court, Taiping, Perak but was refused on the ground that it offended s. 41B(1)(b) of the Act. In relation to the Accused, bail means releasing her from prison and delivering her into the hands of the sureties (see the meaning of bail as discussed by Khode CJ in *Aminchand v. Crown* (AIR) 1950 EP 531 51 Cr. L.J. 480). The effect of granting bail is not to set the Accused free but in actual fact to release her from the custody of the law and to entrust her to the custody of her sureties, who are bound to produce her to answer on her trial at a specified time and place.

Encik Mohd. Ismail bin Mohamed, the learned Counsel, urged me to exercise my revisionary powers to set aside the order of the learned Judge, Sessions Court and release the Accused on bail under Chapter XXXVIII of the Criminal Procedure Code ("the CPC"), especially s. 388(i) of the CPC where the proviso made **extreme youth** (any person under the age of sixteen

years) **or sex** (any woman) **or state of health of the Accused** (any sick or infirm person) matters for consideration in the exercise of the Court's discretion. The learned Counsel's arguments for bail to be granted to the Accused centred principally on the provisions of the CPC.

At the outset, I must at once set out the scope of s. 388 of the CPC. That section relates to three types of offences, *viz:*

(a) non-bailable offences punishable with death or imprisonment for life **where there appears reasonable grounds** for believing that the offender is guilty of the offence but the offender is either a youthful offender, a woman, or a sick or infirm person;
(b) non-bailable offences, including those punishable with death or imprisonment for life **where there appears no reasonable grounds** for believing that the offender is guilty of the offence; and
(c) non-bailable offences punishable with death or imprisonment for life **where there appears reasonable grounds** for believing that the offender is guilty of the offence.

It is undeniable that the CPC is the foremost statute in Malaysia governing criminal procedure. Even s. 3 of the CPC enacts, *inter alia,* that all offences under the Penal Code shall be tried according to the CPC. In *Sulaiman bin Kadir v. PP* [1976] 2 MLJ 37, Harun J. (as he then was, now a Supreme Court Judge) was of the view that "Magistrates possess unfettered power to grant bail in all cases including cases not triable by them, except offences punishable with death or life imprisonment where only a Judge may grant bail". It would appear that in the case of the Sessions Courts, which are now able to try offences punishable with life imprisonment and to impose that particular sentence, following Harun J.'s view, the Sessions Court should be able to grant bail for those offences provided there are no reasonable grounds to believe that the offender is guilty of the offence. In *Re K. S . Menon* [1946] MLJ 49, the cases of *King Emperor v. Nga San Htwa* (ILR 5 Rangoon 276) and *King Emperor v. Joglekar* (ILR 54 Allahabad 115) were referred to with approval by A. J. Bostock-Hill (President). It was held that the High Court can grant bail if there appear reasonable grounds for believing that the Accused has been guilty of an offence punishable with death or with imprisonment for life subject to proof of exceptional and very special reasons. This condition was approved in the later case of *Regina v. Ooi Ah Kow* [1952] MLJ 95.

It was strenuously urged upon me by the learned counsel that the Accused, a woman, though she was caught red handed with the drugs, (to be precise, in manual possession of the drugs), should be set at liberty pending trial to enable her to join her family members. She has, it seems, 3 children between the ages of 4 years to 8 years old. The youngest child, always taken ill, after the detention of the Accused. The mother in law could not take care of her children.

Haji Zainol Rashid bin Hussin, the learned Deputy Public Prosecutor, vigorously objected and raised s. 41B(1)(b) of the Act as a sword and argued that bail should not be granted to the Accused.

There is a dearth of local reported cases on the question of bail under the Act. For this exercise, I need only refer to the pertinent ones.

For a start, I shall refer to *Che Su binti Daud v. Public Prosecutor* [1978] 2 MLJ 162, where the High Court in Penang considered bail for a drug trafficking offence not in accordance with s. 41B of the Act but in accordance with the CPC provisions. In granting bail, Gunn Chit Tuan J. (as he then was, now CJ Malaya) held that though a Judge has under ss. 388 and 389 of the CPC absolute discretion in granting bail, that discretion must be exercised judicially and he should not (save for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused had been guilty of an offence punishable with death or life imprisonment.

Next, Wan Yahaya J. (as he then was, now a Supreme Court Judge) in *Loy Chin Hei v. Public Prosecutor* [1982] 1 MLJ 31, after referring to Che Su binti Daud *(supra)* has this to say:

> ... it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws.

> The expression "notwithstanding any written law or any rule of law", to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail.

Further down the page, his Lordship said:

> Where an Act enacts something in general terms and afterwards another Act on a particular subject introduces in express terms special restrictions on that subject, then the rule of construction demands that the provisions in the subsequent legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

His Lordship further said at page 33:

> The discretion as generally given by ss. 388, 389 and 394 of the Criminal Procedure Code has been effectively taken away from the Courts, both the Subordinate and High Courts, by s. 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the Courts, especially those relating to the liberty of the subject who is Accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the Courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.

This is followed by the classical case of *Public Prosecutor v. Chew Siew Luan* [1982] 2 MLJ 119 FC, where Raja Azlan Shah CJ Malaya (as His Majesty then was) had to decide whether a pregnant woman charged for trafficking in drugs could and should be granted bail. This is what his Lordship said at page 119:

> In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s. 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10 March 1978. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

And at page 120, his Lordship had this to say:

> The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of s. 41B of the Dangerous Drugs Act in that regard.

Incidentally, it was this principle that Wan Yahya J. (as he then was, now a Supreme Court Judge) in *Loy Chin Hei (supra)* had tried to explain.

Next, K.C. Vohrah J. also had occasion to consider the provisions of s. 41B (a) of the Act in *Leong Siew Hoong v. Public Prosecutor* [1988] 1 MLJ 396. His Lordship aptly said that:

> Since the offence he has been charged with under the Act is punishable with death, then it falls within the provisions of s. 41B(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death.

In *Yap Sooi Kim v. Public Prosecutor* [1989] 1 MLJ 44, Anuar J. dismissed the application for bail under s. 41B (1)(b) of the Act and was of the view that the words "punishable with imprisonment" refer to the power of punishment which the Court has under the law and not the punishment which the Court may choose to impose.

In *Leong Ying Ming v. P.P.* [1990] 2 MLJ 359, Lamin J. had to consider whether an offence under s. 39A(2) of the Act was a bailable offence. His Lordship held that that section did not come under s. 41B(1)(b) of the Act and accordingly granted bail to the Accused in the sum of RM10,000 in two sureties. On appeal to the Supreme Court by the Public Prosecutor [1993] 1 AMR 11 pg. 399 SC, Gunn Chit Tuan SCJ (now CJ Malaya) applied *Public Prosecutor v. Chew Siew Luan (supra)* and held that the provisions regulating the granting of bail under specific Act like the Dangerous Drugs Act must be construed in the context of the Dangerous Drugs Act and not under the provisions of the CPC. Therefore, the general provisions of the CPC must yield to the specific provisions of s. 41B of the Act. It was further held that the learned Judge should not have granted bail in this case.

The nett result of these judgments would show that bail should not be granted for cases under the Act where the provisions of s. 41B of the Act are brought into play. The restriction on bail under s. 41B of the Act is absolute and neither the Court below nor the High Court has power to admit to bail any person charged with an offence punishable with death or more than '5 years' imprisonment or even for lesser terms when the Public Prosecutor certifies in writing that it is against the public interest to allow bail. By employing clear and unambiguous words in s. 41B of the Act, the Legislature has tied the hands of the Courts, and the Courts must vigorously give effect to it. For the foregoing reasons, I am satisfied that there are no valid reasons for me to disturb the order of the Sessions Court Judge, and accordingly I affirm the said order.

Bail refused.

PUBLIC PROSECUTOR

v.

DORAIGUNARAJU A/L KRISHNAN

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK B. HJ. ISHAK JC
[PERAK CRIMINAL TRIAL NO. 55-18-92]
29 JUNE 1993

SENTENCING: Plea of guilty - Offence under s. 304 (2nd limb) Penal Code - Culpable homicide not amounting to murder - Discretion of Court to determine term of imprisonment - Whether plea of guilty is a mitigating factor - Discount or credit for plea of guilty.

The Accused had pleaded guilty to an amended charge of culpable homicide not amounting to murder under s. 304 (2nd limb) of the Penal Code. The Court having ascertained that the Accused understood and appreciated the consequence and nature of his plea, recorded his plea of guilt and convicted him accordingly.

Held:

[1] It is trite law that no plea in mitigation should be brushed aside lightly but must in all fairness be examined and considered equally with the facts presented by the prosecution. Both aspects of the case (the prosecution and the defence) must be considered in their right perspective so as to strike, an equal balance, in the scales of justice.

[2] In this case, had the trial gone on, and at the end of the day the Accused found guilty, he would be sentenced to 7 $^{1}/_{2}$ years' or 90 months' imprisonment, with effect from the date of his arrest. But since, the Accused had pleaded guilty, on the basis of one-third discount, 5 years' imprisonment was imposed to run with effect from the date of his arrest (30 January 1991).

[Accused sentenced to 5 years' imprisonment with effect from date of arrest].

Cases referred to:
R v. Kenneth John Ball [1951] 35 Cr. App. R 164 ***(refd)***
Reg v. Davies [1978] 67 Cr. App. R. 207, 210 ***(refd)***
Reg v. Sargeant [1974] 60 Cr. App. R 74, 77 ***(refd)***
R v. Ladd & Tristam [1975] Crim. LR 50 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405 / [1988] 1 MLJ 167 SC ***(refd)***

Legislation referred to:
Penal Code, ss. 302, 304